

**UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION SIX**

FEDEX FREIGHT INC.,)	
)	
Employer,)	
)	
-and-)	Case No. 06-RC-140779
)	
INTERNATIONAL BROTHERHOOD OF)	
TEAMSTERS, LOCAL 775)	
)	
Petitioner.)	
)	

EMPLOYER’S BRIEF TO THE REGIONAL DIRECTOR

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Pursuant to Rule 102.67(a) of the Rules and Regulations of the National Labor Relations Board (hereinafter “the Board”), FedEx Freight Inc. (hereinafter “Employer” or “the Company”) submits this Brief in support of its position that the Petition filed by International Brotherhood of Teamsters, Local 175, (hereinafter “the Union” or “the Petitioner”) seeking to represent only the city drivers and road drivers at its Parkersburg Service Center¹ (“PKB” or “Parkersburg”) is inappropriate and the only appropriate unit for purposes of collective bargaining is one that includes all full-time and part-time employees working on the dock at PKB including city drivers, road drivers and dockworkers.

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I. SUMMARY OF THE EMPLOYER'S POSITION

A. The Petitioned-For Unit Is Inappropriate Under Established Board Law.

The Union's petitioned-for unit is wholly inappropriate as it seeks to carve out dockworkers from the city drivers and road drivers. The record establishes the dockworkers are so intertwined with the city drivers and road drivers that excluding the dockworkers is illogical and functionally unworkable. The Petitioner's proposed unit is unquestionably a self-serving unit based upon the extent of the Union's organizing campaign and is not an appropriate unit under well established Board precedent.

PKB has city drivers, road drivers and dockworkers (both full-time and supplemental part-time). The Union has carved out the dockworkers based solely on the fact that city drivers and road drivers require a CDL license, operate a truck and are away from the Service Center a portion of the day. These facts alone are insufficient to outweigh the functional integration and daily interaction between the drivers and dockworkers. The dockworkers are the glue that binds the Employer's operations at PKB. City drivers and road drivers interact/work with dockworkers on a daily basis. All three positions—city drivers, road drivers and dockworkers—are subject to the same hiring process, the same personnel policies and procedures and receive similar training. They receive the same benefits, share the same break rooms and utilize the same time clock. They are supervised by the same supervisors and managers. The city drivers and road drivers are completely functionally integrated with the dockworkers based on the amount of hours drivers spend performing the same exact functions as dockworkers.

As a result, the city drivers, road drivers and dockworkers share such a strong and significant community of interest with one another that it would be impractical and functionally unworkable to exclude dockworkers from the proposed unit. Moreover, requiring the Company

to recognize such a bargaining unit would result in obviously untenable situations, promoting tension between the represented drivers and unrepresented dockworkers performing the same work, side by side. As the Board has often pointed out, the purposes and policies of the Act are to minimize industrial strife, not promote it. *See* 29 U.S.C. §§ 151(1).

B. The Applicability Of Specialty Healthcare.²

Even applying the Board's Specialty Healthcare decision, the petitioned-for unit would still be inappropriate given that: (1) the petitioned-for unit is not a "readily identifiable" group of employees who share a community of interest. Rather, the proposed unit is an "arbitrary segment" of an appropriate unit and a "fractured unit" within the meaning of Specialty Healthcare and longstanding Board law; and (2) the petitioned-for employees share an overwhelming community of interest with the dockworkers.

For all of the foregoing reasons, the smallest appropriate unit must include all full-time and part-time city drivers, road drivers and dockworkers.

II. STATEMENT OF FACTS

A. Petition and Joint Stipulation of Facts.

On November 13, 2014, Petitioner filed an election petition with Region Six of the Board. (Bd. Ex. 1). By its petition, Petitioner seeks certification as the exclusive bargaining representative of a unit of employees described as follows:

Included: All Full-time and Regular Part-time City/Road/Linehaul Drivers.

Excluded: All other employees of the Employer including temporary and seasonal/maintenance/yard jockeys/dock/warehouse/office and plant clericals/customer service/sales/dispatchers/supervisors and guards as defined by the Act.

² Specialty Healthcare and Rehabilitation Center, 357 NLRB No. 83 (2011).

The Company and Petitioner submitted a Joint Stipulation of Facts (“JSF”) which contained agreed-upon facts regarding the PKB operations, plus three Employer Exhibits and three Union Exhibits. The JSF provided extensive evidence concerning the Company’s Parkersburg operations, including its organizational structure, the high degree of daily contact among city drivers, road drivers and dockworkers, the functional integration and interchange amongst employees in these job categories, and its centralized labor relations policies, practices and similar terms and conditions of employment for all employees. It incorporated the transcript from the September 22, 2014 hearing in Case No. 4-RC-133959, which was held before Hearing Officer Barbara Mann at the offices of Region Four of the Board in Philadelphia and the briefs filed in that case.

B. The Record.

As noted, the JSF specifically adopts the testimony and Exhibits from Case No. 4-RC-133959 into the record of the instant case, as well as the Briefs filed by the Company and Union in that matter. Accordingly, in the instant Brief, the Employer has addressed where the salient facts differ rather than restate the facts and transcript citations from Case No. 4-RC-133959.

C. Overview of the Employer’s Business.

1. Description of the Parkersburg Service Center.

FedEx Freight Inc. provides LTL (Less-Than-Truckload) pick-up and delivery services for customers across the country. The Company operates numerous service centers across the country to transfer freight for customers. One such location is the Parkersburg Service Center located in Parkersburg, West Virginia.

PKB is comprised of a dock, offices and a yard. (JSF - ¶8). The dock has approximately 22 operational doors which are used for loading and unloading freight onto trucks. (JSF - ¶8). The offices are attached to the dock. (JSF - ¶8).

There are approximately 23 employees working on the dock at Parkersburg: 10 City Drivers; 11 Road Drivers; one full-time dockworker and one part-time supplemental dockworker. (JSF - ¶4).

2. A Substantial Number of Drivers Regularly Work On the Dock.

Through the JSF, the Employer produced a report detailing the hours worked by city drivers, road drivers and dockworkers in each respective position for the six-month time period ending October 31, 2014. (JSF – Er. Ex. 2). This report demonstrates there is a significant interchange and functional integration regularly occurring between the drivers and dockworkers. In fact, the report shows that 10 of the 21 drivers (over 47%) worked dock hours. (JSF- Er. Ex. 2).

III. LEGAL ARGUMENTS

A. The Petitioned-For Unit Is Inappropriate Under Established Board Law.

A unit limited to the city drivers and road drivers is not an appropriate unit for bargaining because the evidence establishes there is a significant community of interest among all employees who regularly work on the dock. Thus, any unit including city drivers and road drivers must include dockworkers.

The Board has long recognized in the trucking industry “the functional relationship of employees classified as truck drivers to the occupation of other employees or to the particular operation of the employer as a whole has been shown to be so integrated as to substantially minimize, if not eradicate, any real interests separate from those of other production employee, and truck drivers are therefore included in the production and maintenance units.”

E.H. Koester Bakery Co., Inc., 136 NLRB 1006, 1009-1010 (1962). In fact, at one point, the Board automatically included truck drivers in a unit if there was a disagreement. Id. at 1011.

The Board, however, abandoned this automatic inclusion rule and returned to an analysis of community of interest factors. The Board in E.H. Koester Bakery Co., Inc. considered the following factors:

(1) Whether [drivers] have related or diverse duties, mode of compensation, hours, supervision, and other conditions of employment; and (2) whether [drivers] are engaged in the same or related production process or operation, or spend a substantial portion of their time in such production or adjunct activities.

136 NLRB at 1011.

Applying these factors, the Board has repeatedly held that drivers and dockworkers (warehouse employees) must be included in the same unit. For instance, in Calco Plating, Inc., 242 NLRB 1364, 1365 (1979), the Board applied the factors of E.H. Koester Bakery to conclude that drivers shared a sufficient community of interest with the production and maintenance employees to “require” their inclusion in the unit. The Board’s decision was based on the fact that the drivers spent a substantial amount of time working with the production employees or in proximity of one another, and had the same supervision, comparable wages and fringe benefits. Id.; *see also* Standard Oil Company, 147 NLRB 1226 (1964) (Drivers did not constitute a separate appropriate unit because drivers regularly spent a substantial amount of their time in the performance of the same functions as other employees at the Service Center, had common supervision, the same employee benefits and were paid on the same basis); Transway, Inc., 153 NLRB 885 (1965) (The Board held drivers must be included in a unit of loaders because drivers had such a close community of interest because drivers and loaders spent a substantial portion of their time performing identical functions under common supervision and

because of the degree of integration); Olinkraft, Inc., 179 NLRB 414 (1969) (Drivers were not a functionally distinct group because they spent a substantial part of their regular work time performing work identical to that of other employees, including fork lift drivers and loaders); Atchison Lumber and Logging Co., 215 NLRB 572 (1974)(Unit limited to drivers was inappropriate); compare Overnite Transportation Company, 331 NLRB 662 (2000), (Petitioned-for unit of dockworkers and jockeys excluded city and road drivers because there was no common supervision, drivers performed a separate function, possessed special skills, worked away from the facility most of the day and the only evidence of interchange was 68 hours of loading by city drivers as compared to over 20,000 hours of driving).

Even in situations where there was no interchange/integration of functions, the Board has held there is an inherent community of interest between drivers and production employees in relation to the flow of materials into and out of the plant which was sufficient to find units including drivers and production employees appropriate. *See* International Bedding Company, 356 NLRB No. 168 (2011) citing Marks Oxygen Co., 147 NLRB 228, 230 (1964).

Here, it is without question that the Employer's day-to-day dock operations and the individuals responsible for such operations are a highly integrated and functionally complete unit. City drivers, road drivers and dockworkers work closely together as a team on a daily basis to ensure the operational needs of the Service Center are met. There is a common goal to load, unload and deliver freight. Cooperation and daily contact among these three positions on the dock is essential to the smooth operation of the Employer. As a result, the evidence overwhelmingly establishes a regular interchange of positions/responsibilities to ensure the overall objective of the Employer is met.

The common goal of moving freight is one of the reasons why the responsibilities of city drivers, road drivers and dockworkers substantially overlap. This is evidenced by the “essential” job functions listed in each job description. City drivers and road drivers are required to perform many of the same essential job functions as dockworkers. In fact, most of the essential job functions of a dockworker are listed as essential functions on the job descriptions of city drivers and road drivers. Moreover, the actual day-to-day work performed by city drivers and road drivers on the dock, establishes the functional integration of the city drivers and road drivers to the dockworkers. Specifically, over **47%** of the city drivers and road drivers perform dock work. (JSF - Er. Ex. 2).

The mere fact that many dockworkers are called “supplemental” further supports a finding that the three job positions are inseparable. Dockworkers supplement the work the drivers cannot complete. In other words, drivers are responsible for performing dock work and, as set forth in their job description, may be required to perform dock work. Put simply, road drivers and/or city drivers must work the dock to ensure the continued, efficient operation of the Service Center.

Any argument that this work is “optional” and thus insignificant is unsupported in the record. The Company job descriptions submitted by the Union state:

ROAD DRIVER (UN. EX. 1)
Essential Job Duties/Responsibilities

10. May be required to perform job duties of a city driver or a dock employee where operationally necessary.
11. Load and unload freight as required. . . .

CITY DRIVER (UN. EX. 2)
Essential Job Duties/Responsibilities

4. Perform freight handling using appropriate motorized and manual equipment, including but not limited to: forklift, pallet jack and hand truck.
5. Secure freight inside trailers using appropriate tools and supplies, including but not limited to: pallets, straps and rope.
15. May be required to perform job duties of a road driver or a dock employee where operationally necessary.

DOCK WORKER PART-TIME (UN. EX. 3)
Essential Job Duties Responsibilities

1. Perform freight handling using appropriate motorized and manual equipment, including but not limited to: forklift, pallet jack and hand truck.
3. Secure freight inside trailers using appropriate tools and supplies (e.g. pallets, straps, rope).

The Union did not produce any evidence of a road or city driver ever refusing dock work.

While it is true drivers are outside the Service Center during portions of the day, the reality is that for a large portion of the dockworkers' day, drivers are working directly next to and assisting dockworkers with the dock work. The drivers and dockworkers also share common training and skills. Drivers and dockworkers all receive training for dock work upon hire and get certified to operate a fork lift. While road drivers and city drivers are required to have a CDL license, the drivers are not using their CDL license when working on the dock.

Road drivers, city drivers and dockworkers have common supervision. Operational Supervisors and Managers oversee all three positions and can issue disciplinary actions against any of the positions. There are no set supervisors for drivers or dockworkers. Instead, the Operational Supervisor and Manager work together as a team overseeing the dock work.

Road drivers, city drivers and dockworkers also share the same or similar wages, benefits and other terms and conditions of employment. All are paid on an hourly basis, receive the same health benefits and personal days, participate in the same 401(k) plan, have the same break rooms and attend the same employee functions/gatherings. Of note, road drivers are typically paid solely on a mileage basis. Here however, road drivers are assigned an hourly rate because of the expectation/requirement that road drivers perform either dock work or city driving or both. While there are some differences in benefits, the reason is due to the “part-time” designation, not the underlying position. Supplemental dockworkers are not being denied benefits because they are dockworkers; it is because they are only part-time. In fact, full-time dockworkers hourly rates are relatively the same as drivers and they receive the same vacation benefits as drivers.

Based on a review of the community of interest factors found relevant in driver unit cases, the nature of the business and the manner in which drivers and dockworkers work together on a day-to-day basis to ensure the timely delivery of freight, the drivers and dockworkers share such a strong a community of interest, it is self-evident that the only appropriate unit is a unit including all full-time and part-time city drivers, road drivers and dockworkers.

B. Specialty Healthcare Does Not Change The Fact The Petitioned-For Unit Is Inappropriate

Recently, the Board in Macy’s, Inc., 361 NLRB No. 4 (2014), explained the principles of Specialty Healthcare as follows:

when a union seeks to represent a unit of employees ‘who are readily identifiable as a group (based on job classification, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the

Board will find the petitioned-for unit to be an appropriate unit. . . if the petitioned-for unit satisfies that standard, the burden is on the proponent of a larger unit to demonstrate that the additional employees it seeks to include share an ‘overwhelming’ community of interest with the petitioned-for employees, such that there ‘is no legitimate basis upon which to exclude certain employees from “the larger unit because the traditional community of interest factors ‘overlap almost completely.’

361 NLRB No. 4, at *7. Applying Specialty Healthcare to the facts of this case does not change the conclusion that the Union’s petitioned-for unit is inappropriate and the smallest appropriate unit must include all part-time and full-time city drivers, road drivers and dockworkers.

1. The Union’s Petitioned-For Unit Is Not A Readily Identifiable Group.

City drivers and road drivers are not a “readily identifiable group” if the dockworkers are excluded. Rather, the proposed unit is an “arbitrary segment” of an appropriate unit and a “fractured unit” within the meaning of Specialty Healthcare and longstanding Board law.

One of the relevant considerations as to whether a petitioned-for unit is a “readily identifiable group” is whether the unit is “coextensive with a departmental line that the Employer has drawn.” Macy’s, 361 NLRB No. 4, at *8. *See also* The Neiman Marcus Group, Inc., 361 NLRB No. 11, at *3 (2014) (Despite commonalities, the Board held employees within a petitioned-for unit did not share a sufficient community of interest to render the unit appropriate, in part, because the “boundaries of the petitioned-for unit [did] not resemble any administrative or operational lines drawn by the Employer.”).

Here, the petitioned-for unit is not coextensive along a departmental line. To the contrary, the petitioned-for unit carves out two of the three positions that are responsible for working in the dock area at the Parkersburg Service Center. There is nothing on the record stating drivers and dockworkers have separate departments. Rather, the three positions are part

of the same organizational group, with the same organizational goal—to load, unload and transport freight. They interact and work with one another on a daily basis on the dock. They all are supervised and disciplined by the Operational Supervisor and Service Center Manager. The only unit that is coextensive with a departmental line is a unit including all three positions.

The Board also must consider whether the petitioned-for employees share a community of interest. In Macy's, the Board said it would examine the following factors:

Whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between the classification; are functionally integrated with the Employer's other employees; have frequent contract with other employees; interchange with other employees; interchange with other employees; have distinct terms and conditions of employment and are separately supervised.

361 NLRB No. 4, at *8.

An analysis of these factors establishes the petitioned-for unit cannot be found to share a community of interest that is separate and apart from the dockworkers. Thus, the city drivers and road drivers are not a readily identifiable group but an “arbitrary segment” of an appropriate unit and a “fractured unit” within the meaning of Specialty Healthcare. In Levitz Furniture Company of Santa Clara, Inc., 192 NLRB 61, 63 (1971), the Board held drivers did not constitute a “separate identifiable unit” with special interests sufficient to warrant their separate representation. The reason was because the drivers were under the same supervision as other employees, received substantially similar benefits, worked the same hours, and were paid on the same basis. Id. The fact that there was regular and frequent interchange with other employees outweighed the fact that drivers spent a majority of time away from the plant. Id.

The facts here are more compelling than in Levitz:

- Separate Department: As noted above, the road drivers and city drivers are in the same department as the dockworkers. There are no separate driver and dock departments.
- Distinct Skills and Training: All three positions are trained to perform dock work upon hire, including operating a fork lift and loading and unloading freight.
- Distinct Job Functions/Perform Distinct Work: All three positions perform dock work. Many of the essential functions of drivers are identical to those of dockworkers. In fact, road drivers and city drivers are specifically advised that an essential function of their job is the performance of dock work.
- Functionally Integrated: City drivers and road drivers regularly perform dock work on a weekly and daily basis. As previously noted, over 47% of road and city drivers worked dock hours work; 40% of road drivers work on the dock; road drivers perform dock work on a daily basis.
- Frequent Contact with Other Employees: City drivers and road drivers have daily contact with dockworkers and often are working directly with or next to dockworkers.
- Distinct Terms and Conditions of Employment: All positions share the same break room, locker room, medical benefits, personal days and 401(k). All full-time positions share the same vacation benefits.
- Separately Supervised: All three positions are supervised by an Operational Supervisor and can be disciplined by the Operational Supervisor and Service Center Manager.

In short, the city drivers, road drivers and dockworkers are in the same department, have common supervision, perform the same or similar functions and skills, all work on the dock and interact/intermingle and work together on a daily basis towards a common goal/objective—to load, unload and timely delivery freight. Due to the Company's organizational structure and the complete integration of road drivers, city drivers and dockworkers on the dock, it cannot be concluded that city drivers and road drivers are a readily identifiable group. The only readily identifiable group must include city drivers, road drivers and dockworkers.

2. **The Dockworkers Share An Overwhelming Community of Interest With The Employees In the Petitioned-For Unit.**

As the Board stated in Macy's, two groups share an overwhelming community of interest when their community of interest factors “overlap almost completely.” Macy's, 361 NLRB, No. 4, at *9. The facts establish the petitioned-for city drivers and road drivers’ community of interest factors overlap almost completely with dockworkers. In fact, city drivers and road drivers actually have more in common with dockworkers than with one another. This renders the Union’s petitioned-for unit inappropriate even under the analysis set forth in the Specialty Healthcare decision.

In the few cases decided after Specialty Healthcare, the emphasis by the Board in determining whether petitioned-for employees have an overwhelming community of interest with additional employees has been on whether the petitioned-for employees worked in a separate department, reported to different supervisors, worked in separate physical spaces, and had functional integration. See Grace Industries, 358 NLRB No. 62 (2012); DTG Operations, Inc., 357 NLRB No. 175 (2011); Guide Dogs for the Blind, Inc., 359 NLRB No. 151 (2013).

One of the more significant factors looked at by the Board under Specialty Healthcare is whether the petitioned-for unit tracks a dividing line drawn by the employer. Macy's, *supra*. Here the petitioned-for unit of city drivers and road drivers does not track an organizational line of the Employer. There is no drivers only department. Rather, the operational structure is more akin to grouping work associated with the dock which includes the drivers. Thus, the petitioned-for unit is contrary to the organizational structure of the Employer because it is excluding the dockworkers. This factor weighs heavily in favor that the petitioned-for unit is inappropriate.

Moreover, the factors, discussed more fully in Sections A and B1 above, further prove the overwhelming community of interest factors among city drivers, road drivers and dockworkers. Unlike the cases decided after Specialty Healthcare, here there is common supervision, skills, benefits, and wages as well as substantial integration and almost daily interaction and interchange with each other. See Calco Plating, Inc., 242 NLRB 1364, 1365 (1979) and Standard Oil Company, 147 NLRB 1226 (1964).

The Board has made it clear that the decision in Specialty Healthcare did not create a new community of interest test, nor did it abandon “various presumptions and special industry and occupational rules” or rules applicable only in specific industries. 357 NLRB No. 83, at *13, fn 29. Consequently, the extensive precedent regarding appropriate units in the trucking industry, as cited in Section A, remains very much in effect. Accordingly, under any standard applied by the Board, the facts warrant a finding that the petitioned-for unit of only city drivers and road drivers is inappropriate. Rather, the smallest appropriate unit must include city drivers, road drivers and dockworkers.

3. Applying The First Prong Of *Specialty Healthcare* Renders The Petitioned-For Unit Inappropriate.

A significant underlying flaw to the Petitioner’s sought unit of only road and city drivers is that this unit, standing on its own, has less contact with each other and less interaction with each other than they do with dockworkers. Specifically, under Specialty Healthcare, this lack of interchange and interaction defeats the petitioned-for unit on its face. There is virtually no record testimony of interaction between the city driver and the road drivers (in contrast to significant record testimony of the interaction between those groups and dockworkers when they perform dock work).

Petitioner has argued in its Brief before the Board in Case No. 4-RC-133959 that each of the city drivers, road drivers and dockworkers have separate supervision. At PKB the two supervisors have responsibility for all the employees. (JSF - ¶¶ 7, 9). In the area of compensation, road drivers are compensated based on miles traveled. City drivers are compensated based on an hourly rate (just as the dockworkers are paid). Road drivers may also be paid hourly for dock work. In terms of their day-to-day interaction, city drivers and road drivers have none. However, 40% of the city drivers work on the dock to help load vehicles and 60% of the road drivers do the same. (JSF - Er. Ex. 2). That causes direct, frequent and ongoing interaction with the dockworkers -- not between and among the city and road drivers. Also established in the record in 4-RC-133959, city and road drivers have completely separately routes which they bid upon via completely separate seniority lists. In essence, road drivers do not bid on city work nor do city drivers bid on road work. These facts make clear that the Petitioned-for unit is entirely premised on the Union's extent of organizing and not from any shared community of interest between road drivers and city drivers.

In Odwalla, Inc., 357 NLRB No. 132 (2011), the Board determined that merchandisers should be included along with a group of route service representatives, warehouse employees, cooler technicians and a number of other positions. Id. at p. 1. The Board reasoned that since the union had, through its own petition, sought to incorporate job titles in different departments which did not share a singular community of interest, their desire to draw a boundary between the merchandisers and all the other included employees was unsupportable. Id. at p. 6.

In essence, the Petitioner here has engaged in the same course of action as the Odwalla, Inc. petitioner. It has sought to include two divergent classifications with virtually no

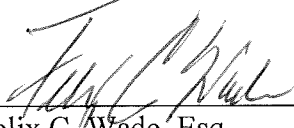
daily interaction, and different compensation, yet has excluded the dockworkers. Under the precepts of Odwalla, Inc., dockworkers are akin to the merchandisers and must be included in any unit deemed appropriate.

IV. CONCLUSION

As the foregoing demonstrates, the Union petitioned for an inappropriate unit of city drivers and road drivers, who do not constitute a “readily identifiable” group of employees. There is an overwhelming community of interest among city drivers, road drivers and dockworkers based on common supervision, integration of operations, common terms and conditions of employment, and functional integration. Petitioner’s unit would unnecessarily bifurcate dockworkers based only on Petitioner’s apparent lack of interest, not on any sound legal reasoning. Petitioner should not be permitted to arbitrarily carve out dockworkers from an integrated organizational structured group of employees designed to work towards a common objective. Based upon the overwhelming record evidence, the Regional Director should find the Petitioner’s requested unit inappropriate and the smallest appropriate unit must include full-time and part-time city drivers, road drivers and dockworkers.

Dated: December 9, 2014

Respectfully submitted,



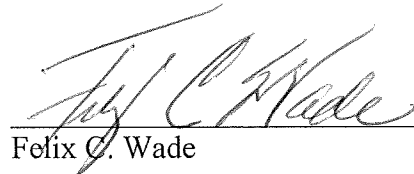
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CERTIFICATE OF SERVICE

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